No. 78-867

In the Supreme Court of the United States

OCTOBER TERM, 1978

HAROLD C. NORMAN, PETITIONER

v.

DONALD J. SMITH and HAROLD R. PATTON

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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1. Petitioner, formerly a colonel in the Illinois Air National Guard, filed this suit to challenge his involuntary retirement from active military status in 1976 on the recommendation of a Vitalization Board convened under Air National Guard Regulation 36-06 (Pet. App. D1-D8).[1]

[1] Petitioner also was employed as a civilian technician with the Illinois National Guard. This federal job is open only to persons on active military status in the Guard. 32 U.S.C. 709. On dismissal from active military duty, a guardsman's employment as a technician terminates. Part of the relief sought by petitioner was reinstatement in his civilian position on reactivation of his military status (Pet. 4).

Members of the National Guard ordinarily must retire after 30 years of service, which in petitioner's case was reached in 1973. But an order issued by the National Guard Bureau authorized the Illinois National Guard to retain in active status certain officers who had been continuously employed since before 1955 as commissioned officers and civilian air technicians (Exh. A to Complaint). The Illinois National Guard, in turn, authorized petitioners' retention, so long as he remained otherwise qualified, until September 17, 1981, when he would reach age 60 (*ibid.*). Petitioner, like all other officers with more than 20 years of qualifying service, was nonetheless subject to annual reviews by Vitalization Boards convened to recommend which officers should be retained in light of the Air National Guard's objective of avoiding "loss of combat readiness in a maturing force" (Air National Guard Regulation 36-06, Section 2 (Pet. App. D1)).

Petitioner, alleging a conspiracy to terminate his service, brought this action against Donald J. Smith, Chief of Staff of the Illinois Air National Guard, Harold R. Patton, former Adjutant General of the State of Illinois, and others no longer in the case (Pet. App. A2). He charged that the composition of the Vitalization Board was technically improper[2] and that its members were biased. He sought injunctive relief, damages, and costs, including attorney's fees.

[2] The parties disagree on the factual question whether the Adjutant General, as required by Air National Guard Regulation 36-05, Section 6 (Pet. App. D3), appended to the order empaneling the Board a notice justifying the placement on the Board of an officer junior in rank to petitioner.

While the suit was pending, petitioner was reinstated with full backpay, after successful administrative appeals. After receiving notice of the reinstatement, the district court dismissed petitioner's claim as moot (Pet. App. B1).[3]

The court of appeals, without considering the question of mootness, affirmed the dismissal on the ground that judicial review of the actions taken to effect petitioner's retirement would constitute unwarranted interference with military matters (Pet. App. A1-A4).

2. The decision of the court of appeals is correct. In the circumstances of this case, the issues raised by petitioner are nonjusticiable. In a nearly identical case, *Turner* v. *Egan*, 358 F.Supp. 560 (D. Alaska), aff'd, 414 U.S. 1105 (1973), two Air National Guard officers challenged their involuntary retirement on due process grounds.[4] For the purpose of determining whether judicial review was appropriate, the three-judge district court in that case adopted the balancing test employed in *Mindes* v. *Seaman*, 453 F.2d 197 (5th Cir. 1971). Under that test the strength of the plaintiff's claim and the potential injury to the plaintiff if review is refused are weighed against "the type and degree" of interference with a military function

[3] Following that reinstatement, petitioner was discharged on medical grounds (Pet. 3 n.1).

[4] In *Turner* the plaintiffs complained of the absence of procedural due process, including insufficient notice of the convening of the Vitalization Board, ineffective administrative appeal rights, and violations of applicable statutes and regulations. 358 F.Supp. at 562.

anticipated as a consequence of judicial review and "the extent to which the exercise of military expertise or discretion is involved." *Turner* v. *Egan*, *supra*, 358 F. Supp. at 563.

In *Turner* the court found that the plaintiffs' procedural due process contentions and the slight injury occasioned by their retirement under honorable conditions with full military benefits did not outweigh the danger that judicial intrusion might cause to the military's efficient operation of its program for seeing that its officers are those most qualified to serve—a program "centered upon the need to avoid the loss of combat readiness" and one "properly left to the experience and discretion of the military, those professionally trained for that purpose." *Id.* at 563-564. Accordingly, the court dismissed the complaint. This Court summarily affirmed that decision, and the court of appeals properly followed the *Turner* rationale here (Pet. App. A3-A4). See *Hicks* v. *Miranda*, 422 U.S. 332, 344 (1975).

Petitioner, like the *Turner* plaintiffs, raises procedural due process issues related to a decision not to retain him as an Air National Guard officer. He has even less than the *Turner* plaintiffs to show in the way of potential injury if review is denied. Because the Vitalization Board's decision not to retain him was administratively reversed, and he was reinstated with backpay, the only injury resulting from denial of review is his inability to seek recovery of damages from the individual defendants. The benefit to petitioner of judicial resolution of his contentions is

thus outweighed by the damage such resolution might do to efficient conduct of military functions. As the court of appeals stated, the "staffing and retention of senior officers in command positions are clearly internal military judgments within the realm of the expertise and discretion of the military" (Pet. App. A3-A4). It properly concluded that granting judicial review of petitioner's claims "would seriously impede the military's ability to perform its vital function," and that dismissal of the complaint was, accordingly, the proper course (Pet. App. A4). See *Gilligan* v. *Morgan*, 413 U.S. 1 (1973).

Petitioner's reliance on *Tennessee* v. *Dunlap*, 426 U.S. 312 (1976), is unwarranted. This Court rejected the due process claim of the National Guard technician in that case, and, although it did so on grounds other than the grounds for dismissing the claim in *Turner*, it said nothing to suggest it was repudiating its decision in *Turner*.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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